IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9507 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

DILIPKUMAR G SHANKER VAIDYA KAMREJ - Petitioner(s)
Versus
STATE OF GUJARAT & ORS & 3 - Respondent(s)

==========

Appearance :

MR DHIRENDRA MEHTA for Petitioner(s) : 1,
MR LR PUJARI, ASSTT.GOVERNMENT PLEADER for Respondent(s) : 1 - 2.
None for Respondent(s) : 3 - 4.
MR YN OZA, SR.ADVOCATE WITH MR BP GUPTA for Respondent(s) : 3.2.1, 3.2.2, 3.2.3, 3.2.4,3.2.5
RULE SERVED for Respondent(s) : 4.2.1, 4.2.2, 4.2.3,4.2.4

==========

CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 09/03/2007

ORAL JUDGMENT

1. Shri Dhirendra K. Mehta, learned counsel for the petitioner, Shri L.R.Pujari, learned AGP for

respondents no.1 and 2, Shri Y.N.Oza, Sr.Advocate with Shri B.P. Gupta, learned counsel for some of the legal representatives; none for the respondent [since deceased through legal representatives] though served. The parties are heard finally.

2. On 13.3.78, Assistant Collector, Olpad Division, Surat, allowed Thakorbhai Vallabhbhai, original land holder to sell 1 Acre and 36 Gunthas of land to the respondents no.3 and 4. It was accordingly sold and thereafter, revenue entry no. 2121 was made in the revenue records. On 20.11.78, yet another revenue entry no.2184 was made in the revenue records with regard to consolidation of holdings as per the records of the Assistant Consolidation Officer-3, Kathor. On 18.10.78, that is, before consolidation entry was made, the present petitioner Dilipkumar Ganpatshanker Vaidya made an application to Talati cum Mantri that he also has existing rights in land survey no. 362 admeasuring 1 Acre and 36 Gunthas and therefore, his name be mutated and an entry be made. Respondents no.3 and 4 appeared before the officer, their statements were recorded. They stated before the officer that the petitioner had existing right in the property and he was a coparcener/copartner and was entitled to mutation and an entry in his name in the revenue records. On 15.2.79, an entry was made in favour of the present petitioner. Subsequent to that,

respondents no.3 and 4, namely, Chintamani and Bhalchandra, uncles of the present petitioner Dilipkumar made an application to the competent authority for deletion of their names, submitting inter alia, that in fact, the petitioner was the sole owner of the property. Their application was taken up for consideration, their statements were recorded and after recording satisfaction, concerned officer directed deletion of names of respondents no. 3 and 4 from the revenue records and made an entry to that effect as entry no. 2395.

3. It appears that almost after nine years of the said entry, Assistant Collector, Olpad Division, issued a notice to the petitioner to show cause as to why entry no. 2395 dated 1.10.80 be not deleted in exercise of suo motu revisional powers as the entry tantamounts to violation of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 [“Fragmentation Act” for short]. Before any proceedings could be taken or final order could be made, the Assistant Collector, again on 29.2.92 issued a notice to the petitioner to show cause as to why action under the provisions of he Fragmentation Act be not taken and the entry be not deleted. On 20.5.92, Assistant Collector, without making any inquiry, only on basis of the reply filed by the petitioner and objections raised by the respondents no. 3 and

4, in exercise of suo motu revisional powers in Suo Motu Revision No. RTS. / TEAM / REV / Reg.108 / Kamrej /87, set aside the revenue entry no. 2203 dated 15.2.79 and revenue entry no. 2395 dated 1.10.80 and directed restoration of possession in favour of the respondents no. 3 and 4, he also imposed fine of Rs.250/- upon the respondents no. 3 and 4. The petitioner thereafter preferred a revision before the Collector, Surat, who in turn, refused the memo and asked the petitioner to file revision before the Principal Secretary [Appeals], Revenue Department. The petitioner accordingly, on 12.8.92 filed the said revision which came to be heard by the Deputy Secretary [Appeals], who dismissed the said revision application no. SRD/CON/ST/6/92 on 2.5.94. The petitioner being aggrieved by the show cause notices and order passed by the Assistant Collector and Deputy Secretary [Appeals], is before this Court.

4. Shri Dhirendra K. Mehta, learned counsel for the petitioner submits that the first notice referred to entry no. 2395 and was requiring the petitioner to show cause as to why the said entry be not set aside. His submission is that the second notice to show cause issued on 29.2.92 referred to alleged sale, while in fact, there was no sale. His submission is that if the petitioner had come out with the case that the property belonged to him, but was purchased by his uncles, then without inquiry that to whom

the land belonged and whether there was fraud as alleged by the respondents no. 3 and 4, Assistant Collector could not pass any order. His further submission is that in absence of a notice to take up entry no. 2203, the said entry dated 15.2.79 could not be set aside. His further submission is that the Assistant Collector had simply observed that insertion of name of the petitioner was in nature of a transfer to circumvent the provisions of the Registration Act, Stamp Act and Fragmentation Act, while in fact, parties had understood that the property belonged to the petitioner. Shri Mehta also submits that present is a case where suo motu powers are sought to be exercised almost after ten years of the entry and in view of catena of the authorities, such powers could not be exercised after lapse of ten years.

5. Shri Y.N. Oza, learned Sr.Advocate for some of the respondents submits that present is a case where fraud was played by the petitioner by producing some persons who in fact were not Chintamani and Bhalchandra. The petitioner had no right of an owner in the property and entry of his name in the revenue records was with ulterior motive to confer ownership upon the petitioner, while in fact, the petitioner had not purchased the property from anybody. His further submission is that even if the second notice issued on 29.2.92 is ignored as it refers to alleged sale, then too, the first notice

dated 7.10.89 would still be effective and the authorities could act upon it. His further submission is that present is a case where facts are floating on the surface of the records and the authorities were justified in directing deletion of the entries in view of the allegation of fraud.

6. It is to be noted that the first entry no. 2203 was made in favour of the petitioner on 15.2.79. The second entry no. 2395 was made on 1.10.80. Chintamani and Bhalchandra during their lifetime did not challenge the said entry. The respondents/legal representatives, however, submit that these entries were made behind the back of the said Chintamani and Bhalchandra and therefore they had no occasion to challenge the same. Be that as it may. But even after the notice from the Assistant Collector, they did not make separate application for making an inquiry into the allegations of fraud that whether entry was absolutely null and void, because fraud was played upon the authorities. They simply raised their objections and submitted that they had not appeared before the Talati cum Mantri or before the competent authority. Their submission was that some people impersonated them and appeared before the authorities.

7. The first notice dated 7.10.89 was issued almost after nine years, question of delay would ordinarily assume importance if the suo motu

revisional powers are to be exercised by a person, an officer or Court. The delay in exercise of the powers virtually satisfies a person/noticee that he has acquired perfect right and nobody can dislodge his claim. The question of delay appears to have not been considered either by the Assistant Collector or by the Deputy Secretary [Appeals]. There are judgments to the effect that in a given case, delay would assume importance and the revisional authority would not be permitted or allowed to exercise suo motu revisional powers.

8. The first notice dated 7.10.89 referred to entry no. 2395 dated 1.10.80 only, it did not refer to the revenue entry no. 2203 dated 15.2.79. Entry no. 2203 dated 15.2.79 related to inclusion of the name of the petitioner. On 7.10.89, the authority knowing well that names of two of the co-owners were to be deleted, did not take into consideration nor appreciated that entry including the name of the petitioner is also required to be set aside because otherwise entry dated 15.2.79 continues in favour of the petitioner and he would be onrecord as co-owner. On 29.2.92, the Assistant Collector developed further case in favour of the respondents no. 3 and 4 and issued notice on the ground that 1 Acres and 36 Gunthas of land was sold by Chintamani and Bhalhandra, both sons of Hariram Vaidya. He also observed that the sale would be in violation of consolidation proceedings and

the Fragmentation Act. He also observed that as there was violation of Section 7 of the Fragmentation Act, an action under Section 9[1] of the Act was required. He did not say that the entries were fraudulent, the petitioner had no right, title or interest or ownership in the property or the entries were result of mistake, bona fide error or fraud. If the second notice dated 29.2.92 is set aside or is ignored from consideration as it contains a statement which is not true nor is it anybody's case, then we are left with notice dated 7.10.89 only. In the said notice, I have already observed, there is no mention of entry no. 2203 dated 15.2.79. On the basis of this notice, dated 7.10.89, the Assistant Collector could not set aside the entry dated 15.2.79 [entry no. 2203] if he assumed jurisdiction by issuing notice in relation to entry no. 2395 only, then without notice to the petitioner, he could not set aside the earlier entry. From the order dated 20.5.92 [Annexure:C to the petition] passed by the Assistant Collector, Olpad, it appears that he had taken into consideration the entry no. 2203 and entry no. 2395 and held that the insertion of the name of the petitioner amounted to transfer of the property. He also observed that the said entry was to circumvent the provisions of the Registration Act, provisions of the Stamp Act and Fragmentation Act. Unfortunately, no notice was ever issued to the

petitioner that entry of his name was to circumvent the provisions of the Registration Act, Stamp Act and Fragmentation Act. The law in case of a suo motu revision is clear. An authority assumes jurisdiction on the points which it has detailed in its notice. His powers are not like flood which encompasses everything within its sweep or everything which falls unfortunately within its jurisdiction. For exercising suo motu revisional power, one must find foundational facts. If the foundational facts are not available, then castles cannot be built in the air. In the present matter, the Assistant Collector, probably less realising extent of his jurisdiction, impressed by his powers, entered in the field of suo motu revisional powers and tried to set aside all those orders, which otherwise he could not unless notice of the same was given to the petitioner.

9. It is also to be seen from the order passed by the Assistant Collector that he did not make any inquiry into the facts/allegations and counter allegations. When a notice is issued to a party and the party files its reply and objector files his objections, then, on a question of disputed fact, an inquiry is required to be made. In the present matter, the Assistant Collector, for the reasons best known to him or probably influenced by the objections raised by the respondents no. 3 and 4, without any inquiry, directed deletion

of the entries which he was not entitled to order. Unless the Assistant Collector had recorded a finding that the petitioner had no right, title or interest in the property and his name could not be mutated on 15.2.79, he could not hold that there was breach of provisions of the Act.

10. Deputy Secretary [Appeals], unfortunately while towing the line, went a step ahead and started observing that present was a case of fraud. It is trite to say that in case of fraud, an allegation would not take place of the proof. In case of fraud, evidence beyond shadow of doubt is required to be brought on the records. Allegation of fraud is easy to make, but is difficult to prove and if such exercise regarding evidence is not undertaken, then it would become impossible to disprove th allegation because a person against whom such allegations are made would not know that why he is condemned.

11. The Deputy Secretary [Appeals] confirmed the order, but without appreciating that it was wrong. He did not appreciate that what was his jurisdiction and what he was required to do. He did not even appreciate that entry no. 2203 could not be set aside as there was no notice for deletion of said entry. He had simply observed that entries no. 2203 and 2395 have been made except in accordance with law. He also observed that, even without any evidence on the

records, in the land in dispute, the petitioner's father had no right, title or interest. In the opinion of this Court, so long as the statements made by Bhalchandra and Chintamani are available on the records, deletion of their names has not been challenged and an inquiry is not made into the allegations of fraud, then it would not be possible for anybody to say that the petitioner ever made any fraud or entries were result of the fraud. As proper inquiry has not been made and no proper opportunity was given to the parties to prove their allegations and counter allegations and as question of delay has not been appreciated in its true perspective, I am of the opinion that the orders passed by the Assistant Collector and confirmed by the Deputy Secretary [Appeals], deserve to be quashed, those are accordingly quashed. If as a result of the grant of any order in favour of the respondents no. 3 and 4 any entry has been reversed, then the same would be immediately restored.

12. In view of the findings aforesaid, I remand the matter back to the Assistant Collector to make an inquiry in accordance with law by giving proper opportunity to the parties. The petitioner would be entitled to summon original records and would be entitled to prove admissions made by the respondents no. 3 and 4. He would also be entitled to raise a question of delay in issuance of notice and its effect on

the powers of the authority. He would also be entitled to submit before the authorities that notice dated 29.2.92 is based upon misconception or on wrong impression that the property was sold while in fact, it was not. He would also be entitled to raise a plea that in absence of a notice to show cause, the revenue entry no. 2203 dated 15.2.79 could not be set aside. Respondents no. 3 and 4 [through their legal representatives] would be entitled to lead evidence in support of their allegations that neither the petitioner nor his father Ganpatishanker Vaidya had any right, title or interest in the property, therefore, entry no. 2203 or entry no. 2395 could not be made, however, subject to the objection which may be raised by the petitioner that entry no. 2203 cannot be interfered with in absence of a notice to show cause. The respondents would also be entitled to prove before the authorities that in fact, fraud was played before the Talati cum Mantri or authority and in fat, the respondents no. 3 and 4 did never appear before the authorities and some other persons impersonated as respondents no. 3 and 4 and appeared before the said authority.

13. The petition is allowed. Rule is made absolute. No costs.

14. The parties present before the Court shall appear before the Assistant Collector, Olpad on 16th April, 2007 with a copy of this order. The

parties who are unrepresented would be issued notice to appear and after service is effected, the Assistant Collector shall proceed with the matter and try to dispose of the same, preferably within one year from the date of appearance of the parties.

[R.S. GARG, J.]

pirzada/-